83-2119

IN THE

SUPREME COURT of the UNITED STATES

October Term, 1983

No. _____

CONSOLIDATED FREIGHTWAYS CORPORATION OF DELAWARE, a Delaware corporation,

Petitioner,

vs.

RAYMOND KASSEL, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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Petitioner Consolidated Freightways Corporation of Delaware respectfully prays that a Writ of Certiorari issue to review an order of the United States Court of Appeals for the Eighth Circuit entered March 27, 1984.

QUESTIONS PRESENTED

(1) Is there a constitutionally secured right to engage in interstate commerce?

(2) Is a state law, which takes property and which the state does not have jurisdictional power to enact, a violation of due process?

PARTIES TO THE PROCEEDING BELOW

Plaintiff: Consolidated Freightways Corporation of Delaware.

Defendants: Raymond Kassel, Robert Rigler, L. Stanley Schoelerman, Don Gardner, Jules Busker, Allan Thoms, Barbara Dunn, William McGrath, Jon McCoy, Charles W. Larson, Col. Edward Dickinson, Richard C. Turner, and the Honorable Robert D. Ray.

Defendant Intervenor: Motor Club of Iowa.

Consolidated Freightways Corporation of Delaware is a wholly owned subsidiary of Consolidated Freightways, Inc. Both Companies wholly own all of their subsidiaries, except for United Terminals, Ltd., which is 50% owned by NLI Corporation, a subsidiary of Time-D.C., Inc.

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The opinion of the Court of Appeals is published at 730 F.2d 1139 (8th Cir. 1984). The District Court opinion is published at 556 F. Supp. 740 (S.D. Iowa 1983).

JURISDICTION

The order of the Court of Appeals for the Eighth Circuit was entered March 27, 1984. This Petition for Certiorari is filed within 90 days of that date. This Court's jurisdiction is involked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution,

Art. I, §8:

"The Congress shall have power . . . To regulate commerce . . . among the several states . . ."

United States Code, Title 42:
§1983 Civil Action for Deprivation of Rights.

"Every person who, under color of any statute, . . . of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, . . . secured by the Constitution . . . shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

§1988 Proceedings in Vindication of Civil Rights.

"In any action or proceeding to enforce a provision of section(s) . . . 1983 . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as a part of the costs."

STATEMENT OF THE CASE

There have been three branches to this case, two of which were previously before this Court.

The first branch is the case-in-chief. Consolidated Freightways challenged Iowa's law prohibiting 65-foot twin trailers as a violation of the Commerce Clause, the Fourteenth Amendment, and 42 U.S.C. §1983.[1] Attorney's fees were requested under 42 U.S.C. §1988, but this issue was bifurcated and not tried with the case in chief. The District Court granted judgment on the Commerce Clause claim. *Consolidated Freightways Corp. v. Kassel*, 475 F. Supp. 544 (S.D. Iowa 1979). On appeal, the Eighth Circuit and this Court sustained the District Court. *Kassel v. Consolidated Freightways Corp.*, 612 F.2d 1064 (8th Cir. 1979); affirmed 450 U.S. 662 (1981).

The second branch arose immediately after the Eighth Circuit's decision on the case-in-chief, when it summarily denied attorney's fees for the appeal. No reasoning was given for the denial. Consolidated petitioned for certiorari on the ground that the Eighth Circuit must give the rationale for its denial of attorneys' fees. This Court granted certiorari. In its briefs and oral argument, Consolidated contended that the underlying constitutional issue was not ripe, was not raised in the petition for certiorari, and was not properly before the Court. This Court subsequently dismissed the writ as improvidently granted. *Consolidated Freightways Corp. v. Kassel*, 455 U.S. 329 (1982).

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[1]The District Court had jurisdiction under 28 U.S.C. §1331, 1332, 2201-2202, and 1343.

The third and final branch deals with attorney's fees for the trial of the case-in-chief. After dismissal of the petition for certiorari, the District Court heard the previously bifurcated application for attorney's fees for the case-in-chief. The application was denied. The District Court held that there was no constitutionally secured right to engage in interstate commerce and that the Commerce Clause did not render Iowa's statute *ultra vires* and, thus, a violation of the Fourteenth Amendment. On appeal the Eighth Circuit affirmed. It is this decision that is at issue under this petition for certiorari. It squarely presents the Constitutional issue.

REASONS FOR GRANTING THE WRIT

Hard cases do make bad law. Historically, 42 U.S.C. §1983 has been the protector of the poor, the black, the imprisoned. However, in refusing to apply 42 U.S.C. §1983 to Consolidated Freightways, the lower courts:

(1) Violated the fundamental basis of our law that there is one law for all, regardless of circumstance.

(2) Rejected 150 years of constitutional history during which the right to engage in interstate commerce was repeatedly held to be a fundamental, constitutionally secured, individual right.

The result is bad law; bad because it violates principles to achieve a desired result in a particular case.

Beginning with *Gibbons v. Ogdon*, 22 U.S. (9 Wheat.) 1 (1824) the courts have recognized an inherent natural

right to engage in interstate commerce, secured by the Constitution.[2]

> "In pursuing this inquiry at the bar, it has been said, that the constitution does not confer the right of intercourse between State and State. That right derives its source from those laws whose authority is acknowledged by civilized man throughout the world. This is true. The constitution found it an existing right, and gave to Congress the power to regulate it." *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 211 (1824).

This court has consistently regarded the removal of the power to regulate interstate commerce from the states and its entrusted to the federal government, to be a means of securing an individual right:

> "But that statute, requiring the corporation, . . . to surrender *a right and privilege secured to it by the Constitution and laws of the United States* was unconstitutional and void . . ." *Western Union Tel. Co. V. Kansas*, 216 U.S. 1, 36 (1910).

> "There are rights of constitutional stature whose exercise a State may not condition by the exaction of a price. Engaging in interstate commerce is one." *Garrity v. New Jersey*, 385 U.S. 493, 500 (1967).

> "[I]n a leading case, *Oklahoma v. Kansas Natural Gase Co.*, 221 U.S. 229. . . . The court held that . . . the right to engage in interstate commerce is not the gift of a state, and the state cannot regulate or restrain it." *H.P. Hood v. Du Mond*, 336 U.S. 525, 535 (1949).

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[2]The right was recognized in the Articles of Confederation, Art. IV. In the seminal case on the privileges and immunities clause, *Corfield v. Coryell*, 6 Fed. Cas. 546 (No. 3,320) (C.C.E.D. Pa. 1823) it was one of the few rights accorded the status of a privilege and immunity of United States citizenship.

> "[The State] imposes a direct burden on the plaintiff's right to engage in interstate business and therefore is in violation of its constitutional rights." *Buck Stove & Range Co. v. Vickers*, 226 U.S. 205, 216 (1912).
>
> "To carry on interstate commerce is not a franchise or a privilege granted by the State; it is a right which every citizen of the United States is entitled to exercise under the Constitution and laws of the United States; and the accession of mere corporate facilities, as a matter of convience in carrying on their business, cannot have the effect of depriving them of such right, unless Congress should see fit to interpose some contrary regulation on the subject." *Crutcher v. Kentucky*, 141 U.S. 47, 57 (1891).

Accord, *James v. Dravo Contracting Co.*, 302 U.S. 134, 158 (1937); *Furst v. Brewster*, 282 U.S. 493, 498 (1931); *Sioux Remedy Co. v. Cope*, 235 U.S. 197, 201 (1914); *Barrett v. City of New York*, 232 U.S. 14, 31 (1914); *West v. Kansas Natural Gas Co.*, 221 U.S. 229, 260 (1911); *International Textbook Co. v. Pigg*, 217 U.S. 91, 112 (1910); *Ludwig v. Western Union Tel. Co.*, 216 U.S. 146, 160 (1910).

It is only in recent years, however, that the courts have had presented to them the question of whether a violation of an individual's right to engaged in interstate commerce is a violation of 42 U.S.C. §1983. With very little discussion, the Montana District Court and the Third Circuit have held that 42 U.S.C. 1983 (or its jurisdictional counterpart, 28 U.S.C. §1343) applied to violations of the right to engage in interstate commerce. *Confederated Salish and Kootenai Tribes v. Moe.*, 392 F. Supp. 1297, 1304-05 (D. Mont. 1975), aff'd on other grounds, 425 U.S. 463 (1976); *Kennecott Corp. v. Smith*, 637 F.2d 181, 186 n. 5 (3d Cir. 1980).

The Eighth Circuit concluded 42 U.S.C. §1983 was inapplicable because (1) the Commerce Clause does not secure an individual right but solely governs the federal relationship, and (2) the fact that the Iowa legislature may have acted outside its jurisdictional power in passing a law that took away property does not cause a due process violation since such a law meets the "reasonableness" test applied to police regulations.

Thus, there exists a conflict among the lower courts as to whether 42 U.S.C. §1983 applies to a violation of an individual's rights under the Commerce Clause. The decision of the Eighth Circuit is equally, of course, in conflict with the previous statements of this Court describing the right as a Constitutionally secured one.

CONCLUSION

This case presents a conflict among the lower courts. This Court should grant certiorari because of the significance of the issue. The crux is whether a historically important constitutionally secured right should be extinguished to avoid application of the Civil Rights laws, and the award of attorney fees thereunder.

Petitioner requests that a Writ of Certiorari be granted.

Dated 22nd day of June, 1984, at Madison, Wisconsin.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

CONSOLIDATED FREIGHTWAYS CORPORATION OF DELAWARE

Plaintiff,

vs.

RAYMOND KASSEL, et al.,

Defendants

MOTOR CLUB OF IOWA,

Defendant-Intervenor.

CIVIL NO. 78-179-1
ORDER

Entered: February 14, 1983

Shortly before the trial of this action in 1979, an Order was entered bifurcating plaintiff's claim for attorney's fees from other issues in the case. Following an extensive trial, the Court found for plaintiff on the merits of its Commerce Clause claim. Consolidated Freightways Corp. v. Kassel, 475 F. Supp. 544 (S.D. Iowa 1979). The Eighth Circuit affirmed, 612 F. 2d 1064 (8th Cir. 1979), as did the Supreme Court, Kassel v. Consolidated Freightways Corp., 450 U.S. 662 (1981).

The Court now has before it the parties' cross-motions for partial summary judgement on the issue of plaintiff's entitlement to an award of attorney's fees under 42 U.S.C. §1988, which provides in pertinent part: "In any action or proceeding to enforce a provision of . . . [42 U.S.C. §] 1983 . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

The Court notes that the "discretion" mentioned in §1988 is circumscribed by case law which holds that a prevailing party in a §1983 action "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." Williams v. Miller, 620 F. 2d 199, 202 (8th Cir. 1980). The burden of proving such "special circumstances" is on the losing defendant. *Ibid.* At this time, however, the question of the existence of "special circumstances" is not before the Court. The narrow question as presented in the cross-motions for partial summary judgment is whether plaintiff is entitled to an attorney's fee award under §1988 *absent* of proof of "special circumstances" by defendants.

There is no dispute over the fact that plaintiff is the "prevailing party" in this case. Thus, the question before the Court is whether this dormant Commerce Clause action can be considered an "action or proceeding to enforce a provision of . . . [42 U.S.C. §] 1983."

Plaintiff's amended complaint asserted that, in addition to violating the Commerce Clause of the Constitution, Iowa's statutory ban on 65-foot twin trailer trucks violated the Fourteenth Amendment and 42 U.S.C. §1983. The Court found for plaintiff on the Commerce Clause ground. The question of whether plaintiff had appropriately asserted § 1983 as an alternative basis for relief was not decided. Similarly, the Eighth Circuit and the Supreme Court affirmed on Commerce Clause grounds, apparently without ever considering whether § 1983 was also an appropriate basis for liability.

Defendants concede, however, that the fact that plaintiff prevailed on a ground other than §1983 does not necessarily preclude an award of attorney's fees under §1988. *See* Maher v. Gagne, 448 U.S. 122, 132 n. 15 (1980). If §1983 would have been an appropriate basis for relief, then plaintiff has a general entitlement to attorney's fees under §1988 even though relief was actually awarded on another ground. *Ibid.*

Section 1983 states in pertinent part:

> Every person who, under color of any statute, . . . of any State . . . subjects, or causes to be subjected, any . . . person within the jurisdiction thereof to the deprivation **of any rights, privileges, or immunities secured by the Constitution** and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

(Emphasis added.) Plaintiff argues that Iowa's ban on long trucks deprived plaintiff of two "rights . . . secured by the Constitution," either of which would constitute a basis for applying §1983: (1) plaintiff's right, under the Commerce Clause, to engage in interstate commerce free from undue burdens imposed by a state, and (2) plaintiff's right not to be deprived of property without due process of law. The Court will first address plaintiff's due process argument.

I. **Due Process.**

The right to due process of law in conjunction with deprivations of life, liberty or property by a state is a right secured by the Fourteenth Amendment. Violations, of that amendment, including those which involve deprivations of property, are clearly within the ambit of §1983. Lynch v. Household Finance Corp., 405 U.S. 538, 543 (1972). The question, therefore, is whether Iowa's long truck ban did in fact deprive plaintiff of property without due process of law.

Defendants argue that plaintiff was not deprived of property within the meaning of the Fourteenth Amendment. The Court need not resolve that question because, even assuming that there was a deprivation of property, the Court perceives no lack of due process. Plaintiff states that "[t]he first element of due process of law is that the person acting have the authority and jurisdiction to act." Plaintiff then argues that because Iowa's statutory ban on long trucks was ultimately found by the federal courts to violate the Commerce Clause, it follows that the Iowa legislature lacked the authority to pass such a statute. The Court views this as merely a "bootstrapping"

argument. In the Court's opinion, the Iowa legislature had authority, for due process purposes, to enact laws governing the use of highways within Iowa's borders; the fact that one of those laws was subsequently found to place an unconstitutional burden on interstate commerce does not transform the enactment of that particular statute into a due process violation. Moreover, under the "arbitrariness" standard which has governed substantive due process challenges to economic regulations since Nebbia v. New York, 291 U.S. 502 (1934), Iowa's statute would clearly survive scrutiny. The Court therefore holds that plaintiff has failed to demonstrate a Fourteenth Amendment violation as a basis for applying §1983.

II. **Commerce Clause.**

Plaintiff has established its Commerce Clause claim. Therefore, the question here is whether the Commerce Clause secures rights which are cognizable under §1983. To answer this question, the Court will examine relevant case law, the nature of the Commerce Clause, and the legislative history of §1983.

A.

The theory underlying plantiff's successful Commerce Clause claim was explained by the Supreme Court as follows:

> The [Commerce] Clause permits Congress to legislate when it perceives that the national welfare is not furthered by the independent actions of the States. It is now well established, also, that the Clause itself is "a limitation upon state power even without congressional implementation." The Clause requires that some aspects of trade generally must remain free from interference by the States. When a State ventures excessively into the regulation of these aspects of commerce, it "tresspasses upon national interests," and the courts will hold the state regulation invalid under the Clause alone.

Kassel v. Consolidated Freightways Corp., 450 U.S. 662, 669 (1981) (citations ommitted).

In determining whether such "dormant" Commerce Clause claims come within §1983, an examination of the jurisdictional basis which has historically been utilized in such cases may be a useful starting point. The jurisdictional counterpart of §1983 is 28 U.S.C. §1343(3). Although §1343(3) does not provide jurisdiction for every §1983 claim which is based on violation of a federal **statutory** right, **see** Maine v. Thiboutot, 448 U.S. 1, 8 n. 6 (1980), it does provide jurisdiction for all §1983 cases which are based on deprivation of constitutional rights, and the two sections are construed identically in such cases. Lynch v. Household Finance Corp., 405 U.S. 538, 544 n. 7 (1972).

Traditionally, dormant Commerce Clause actions have been brought directly under the Constitution, with jurisdiction predicated on 28 U.S.C. §1331 (the general federal question jurisdictional statute)[1] rather than under §1983 and its jurisdictional counterpart, §1343(3). **See, e.g.**, New York State Waterways Association, Inc. v. Diamond, 469 F. 2d 419 (2d Cir. 1972); International Packers Ltd. v. Hughes, 271 F. Supp. 430 (S.D. Iowa 1967). Plaintiff suggests that this is because, prior to Congress's enactment of the §1988 attorney's fee provision in 1976, there was never any need to establish the availability of §1983 in such cases. Although this legislative change has undoubtedly provided an additional incentive to use §1983, an incentive did exist prior to 1976 by reason of the fact that §1331 contained an amount in controversy requirement,[2] while there was no such requirement for actions brought under §1983. **See** §1343(3).

One case in which this incentive became operative was Connor v. Rivers, 25 F. Supp. 937 (N.D. Ga. 1938), **aff'd**, 305 U.S. 576 (1939). The court in that case, after determining that the amount in controversy was insufficient to meet the requirement of the general federal question jurisdictional statute, went on to consider whether there was jurisdiction under §1343(3) (then codified as 28 U.S.C. §41(14)). The three-judge court stated that the history of §1983 (then codified as 8 U.S.C. §43) persuaded them that its jurisdictional counterpart §41(14) "does not give jurisdiction in this suit." **Id.** at 938. The court explained: "While there is an allegation about the Georgia statute's interfering with interstate commerce, it is clear that there is no claim or evidence that said Georgia statute deprives the petitioner 'of any right, privilege, or immunity, secured by the Constitution of the United States [. . .].' " **Ibid. Connor** was affirmed by the Supreme Court in a one-sentence per curiam opinion relating to the lack of the requisite jurisdictional amount. 305 U.S. at 576. Thus, although the Supreme Court did not expressly discuss the applicability of §1983 and §1343(3) to dormant Commerce Clause cases, its affirmance in **Connor** signifies that §1343(3) was unavailable and the Jurisdictional amount of §1331 must therefore be satisfied.

Following **Connor**, it appears that dormant Commerce Clause cases originating in the federal courts have Proceeded on the assumption that §1331 is the sole appropriate basis for jurisdiction and that the jurisdictional amount of that statute must be satisfied. **See, e.g.**, New York State Waterways Association, **supra**; International Packers Ltd., **supra**. Accordingly, Prof. Moore, after discussing categories of cases which can be brought under

§1983 and §1343(3) without regard to the amount in controversy requirement of §1331, stated: "There remain some cases in which redress is sought against action taken under color of law in which the litigation must proceed under §1331 and the minimum amount in controversy must be shown. Actions against federal officers constitute one example. Another example is to be seen in actions challenging legislation as violative of the Commerce Clause." 1 J. Moore, Moore's Federal practive ¶ 0.62 [2.2] at 665-66 (1977) (citations omitted).

B.

Despite the Supreme Court's affirmance of **Connor**, **supra**, and the consistent treatment of dormant Commerce Clause actions subsequent to **Connor**, two recent cases decided by lower federal courts have held that §1983 is an appropriate vehicle for dormant Commerce Clause actions.[3] In Confederated Salish and Kootenai Tribes v. Moe, 392 F. Supp. 1297 (D. Mont. 1974), and its companion case, Confederated Salish and Kootenai Tribes v. Montana, 392 F. Supp. 1325 (D. Mont. 1975) (hereinafter referred to jointly as **Kootenai**), an Indian tribe and certain of its individual members challenged two separate Montana taxing schemes, partly on Commerce Clause grounds. In each case, after finding jurisdiction over the tribal claims under 28 U.S.C. §1362,[4] the three-judge district court went on to find that it had jurisdiction over the individual claims under §1343(3) because the "alleged violation of Commerce Clause rights" stated a claim under §1983. 392 F. Supp. at 1304-05, 1327. The Supreme Court affirmed the lower court's jurisdictional holdings with regard to the tribal claims under §1362, but found it unnecessary to determine the propriety of the district court's conclusion that jurisdiction

over the individual claims existed under §1343(3). Moe v. Confederated Salish and Kootenai Tribes, 425 U.S. 463, 475, n. 14 (1976). The Supreme Court did, in a footnote, remind the district court the in further proceedings, any claims which could only be pursued by the individual plaintiffs "must be properly grounded jurisdictionally. See, **e.g.**, Zahn v. International Paper Co., 414 U.S. 291, 294 (1973)." 425 U.S. at 469 n. 7.

The other recent case favoring plaintiff's position is Kennecott Corp. v. Smith, 637 F. 2d 181 (3d Cir. 1980), in which a corporation sought to enjoin enforcement of New Jersey's Corporation Takeover Bid Disclosure Law, primarily on the ground that it conflicted with the Williams Act, 15 U.S.C §78a et seq. **Kennecott**, 637 F. 2d at 182. The defendants contended that the relief sought was barred by the anti-injunction act, 28 U.S.C. §2283. The Third Circuit panel found §2283 inapplicable on two alternative grounds, one of which was that "actions brought under §1983, such as this case, are explicit exceptions to the antiinjunction act." 637 F. 2d at 186 (citing Mitchum v. Foster, 407 U.S. 225 (1972)). In a footnote, the Court explained: "The present action is properly brought under §1983 because it seeks redress for deprivations of constitutional rights secured by the commerce clause and of federal statutory rights protected by the Williams Act. **See** Maine v. Thiboutot, _____ U.S. _____, 100 S.Ct. 2502, 65 L.Ed. 2d 555 (1980)." 637 F. 2d at 186 n. 5.

Although the statements in **Kootenai** and **Kennecott** are on point, the Court is hessitant to rely on either case because: (1) they are directly contrary to the holding of **Connor**, which was affirmed by the Supreme Court; (2) the

pertinent holdings of **Kootenai** and **Kennecott** have not been reviewed by the Supreme Court; and (3) neither **Kootenai** nor **Kennecott** contains any substantial discussion of the basic question argued by the parties in this case, i.e., whether the Commerce Clause secures rights which are cognizable in a §1983 action.

The sole authority relied upon by the three-judge district court in **Kootenai**, 392 F. Supp. at 1304-05, was dictum from a footnote in Lynch v. Household Finance Corp., 405 U.S. 538 (1972), which noted that the phrase "rights, privileges, or immunities secured . . . by the Constitution" had been interpreted "to embrace '**all** of the Constitution'." 405 U.S. at 549 n. 16 (quoting United States v. Price, 383 U.S. 787,797 (1966)). Even in **Price**, the source of the **Lynch** footnote, the quoted statement was dictum. The issue there was whether 18 U.S.C. §241, the criminal statute involving conspiracies to deprive a citizen of his constitutional rights, included rights protected by the Fourteenth Amendment. 383 U.S. at 797. In holding that it did, the Supreme Court noted that both §241 and 18 U.S.C. §242 (a similar criminal statute lacking the conspiracy element) included, without limitation, rights or privileges secured by the Constitution or laws of the United States. The Court then stated: "Each includes, **presumably**, **all** of the Constitution and laws of the United States." 383 U.S. at 797 (emphasis on "all" in original; emphasis on "presumably" added).

In addition to being dictum, this statement does not answer the question of whether the Commerce Clause, which is phrased in terms of a grant of power to the federal government, is a constitutional provision which secures rights as meant in §1983. Although the Supreme Court has held that the phrase "rights, privileges, or

immunities secured by the . . . laws" of the United States in §1983 is not limited to certain subject-matter categories of legislation, Maine v. Thiboutot, 448 U.S. 1 (1980), it has also recognized that not all statutes secure rights within the meaning of §1983, even though individuals may benefit from their provisions. Middlesex County Sewage Authority v. National Sea Clammers Association, 453 U.S. 1, 19 (1981); Pennhurst State School and Hospital v. Halderman, 451 U.S. 1, 28 (1981). Likewise, although §1983 "presumably" extends to rights secured in any part of the Constitution, **Lynch**, 405 U.S. at 549 n. 16; **Price**, 383 U.S. at 797, there undoubtly are provisions of the Constitution which do not secure rights within the meaning of §1983 and §1343(3). **See** Chapman v. Houston Welfare Rights Organization, 441 U.S. 600, 612-15 (1979) (holding that the Supremacy Clause is not a constitutional provision which secures rights within the meaning of §1343(3)).

The authority relied upon in the **Kennecott** footnote is likewise nondispositive. The only case cited there is **Thiboutot**, **supra**, which merely held that the phrase "and laws" in §1983 is not restricted to federal statutes providing for equal rights, or to any other subset of laws. As noted in the preceding paragraph, this holding had little bearing on the question of whether the Commerce Clause is a constitutional provision which secures rights within the meaning of §1983.

C.

Having discovered no case law which adequately addresses the question, the Court will proceed with its own determination of whether a claim under the dormant Commerce Clause alleges a deprivation "of any right,

privilege or immunity secured by the Constitution of the United States," within the meaning of §1343(3).[5] The Court takes as its starting point the proposition that not every case which "arises under" the Constitution (the language used in §1331) involves a "right, privilege or immunity secured by the Constitution" within the meaning of §1343(3). This is made clear by the Supreme Court's holding in **Chapman**, 441 U.S. at 615, that a Supremacy Clause claim, which can normally be brought under §1331,[6] does not involve any rights "secured by the Constitution" within the meaning of §1343(3).

The Commerce Clause of the Constitution (Art. I, §8, cl. 3) is facially different from the Supremacy Clause, in that the Commerce Clause is a specific grant of legislative power to the Congress with regard to a particular subject matter: "The Congress shall have Power . . . to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." From this specific grant of power, however, has evolved the doctrine that states may not enact regulations which unduly burden interstate commerce even when Congress has failed to exercise its power to establish a uniform national regulation on the particular subject.[7] This "dormant" Commerce Clause doctrine, like the Supremacy Clause, limits the power of a state when the exercise of its otherwise legitimate power comes into conflict with a broader national interest.

Defendants contend that only those constitutional provisions which limit governmental power over individuals should be considered "rights, privileges, or immunities" within the meaning of §1983, and that provisions such as the Supremacy Clause and dormant

Commerce Clause, which are primarily aimed at limiting the power of one government vis-a-vis another government, should be excluded. The distinction between the two types of provisions is well explained in J. Choper, Judicial Review in the National Political Process at 174-75 (1980), as follows:

> When a litigant contends that the national government (usually the Congress, but occasionally the executive, either alone or in concert with the Senate) has engaged in activity beyond its delegated authority, or when it is alleged that an attempted state regulation intrudes into an area of exclusively national concern, the constitutional issue is wholly different from that posed by an assertion that certain government action abridges a personal liberty secured by the Constitution. The essence of a claim of the latter type—which falls into the individual rights category of constitutional issues . . . —is that no organ of government, national or state, may undertake the challenged activity. In contrast, when a person alleges that one of the federalism provisions of the Constitution has been violated, he implicity concedes that one of the two levels of government—national or state—has power to engage in the questioned conduct. The core of the argument is simply that the particular government that has acted is the constitutionally improper one. To put it another way, a federalism attack on conduct of the national government contends that only the states may so act; a federalism challenge to a state practice asserts that only the central government possesses the exerted power; neither claim denies government power altogether.

The dormant Commerce Clause doctrine is clearly a "federalism" provision within Prof. Choper's framework, because a dormant Commerce Clause action does not deny government power altogether:

> Because the Constitution puts the ultimate power to regulate commerce in Congress, rather than the states, the degree of state legislation's interference with that commerce may be weighted by federal courts to determine whether the burden makes the statute unconstitutional. **The courts could not invalidate federal legislation for the same reason because Congress,** within the limits of the Fifth Amendment, **has authority to burden commerce if that seems to it a desirable means of accomplishing a permitted end.**

Morgan v. Virginia, 329 U.S. 373, 380 (1946) (footnotes omitted) (emphasis added). Thus, although Iowa cannot ban 65-foot trucks on interstate routes, Congress could legitimately enact such a prohibition.

Although the Court recognizes that a number of Supreme Court cases have referred to a constitutional "right" to engage in interstate commerce, **e.g.**, Garrity v. New Jersey, 385 U.S. 493, 500 (1967); Western Union Telegraph Co. v. Kansas, 216 U.S. 1, 36 (1910); Crutcher v. Kentucky, 141 U.S. 47, 57 (1891), the Court agrees with defendants that the Commerce Clause was adopted, and the dormant Commerce Clause doctrine has evolved, primarily to further the collective national interest in an efficient economy. **See generally** Hood & Sons, Inc. v. DuMond, 366 U.S. 525, 532-34 (1949). For example, in the Supreme Court's opinion in the case at bar, the emphasis is on the role of the Commerce Clause in preventing state regulation from "trespass[ing] upon national interests," **Kassel**, 450 U.S. at 669 (quoting Great A & P Tea Co. v. Cottrell, 424 U.S. 366, 373 (1976)), and from "impair[ing] significantly the federal interest in efficient and safe interstate transportation," 450 U.S. at 671, rather than guarding plaintiff's individual interests against governmental intrusion.

Of course, businesses engaged in interstate commerce do benefit from the existence of the Commerce Clause and accordingly they often have standing to bring lawsuits to vindicate the national interest protected by that Clause. This does not mean, however, that the Clause should be viewed as a provision securing the rights of individuals against government action rather than the allocation-of-powers or "federalism" provision that it fundamentally is.

Plaintiff argues that the two constitutional categories—provisions which allocate power and provisions which secure rights—are not mutually exclusive, suggesting that the purpose of allocating power in a particular manner is often to secure rights. Plaintiff cites as an example the requirement that all appropriations bills originate in the House of Representatives of Congress. This and other power-allocating provisions of the Constitution, however, are qualitatively different from constitutional provisions which are normally viewed as securing rights. Inuring primarily to the benefit of the nation as a political and economic whole, and only secondarily or indirectly to the benefit of individuals, the "rights" secured by such power-allocating provisions stand in clear contrast to an individual's right to freedom from unreasonable searches and seizures, or an individual's right not to incriminate himself.[8]

The Court's review of the legislative history of §1983 persuades it that the statute was not intended to provide a remedy for constitutional violations of the type involved in this case. Section 1983 was originally §1 of the Ku Klux Klan Act of 1871, which had used §2 of the Civil Rights Act of 1866, 14 Stat. 27, as its model. **Chapman**, 441 U.S.

at 628. The 1871 Act was enacted by Congress pursuant to the power vested in it by §5 of the Fourteenth Amendment to enforce the provisions of that amendment. Monroe v. Pape, 365 U.S. 167, 171 (1961). The statute's primary purpose was to provide a remedy for the new panoply of individual rights which were secured against state interference by the Fourteenth Amendment. That the statute was not intended to provide a means of enforcing constitutional provisions which allocate power between the state and the national government is demonstrated by the following statement of Rep. Shellabarger, a leading proponent of the 1871 Act, during the Congressional debates:

> Most of the provisions of the Constitution which restrain and directly relate to the States, such as those in the tenth section of the first article, that 'no State shall make a treaty,' 'grant letters or margue,' 'coin money,' 'emit bills of credit,' & c., relate to the divisions of the political powers of the State and General Governments. They do not relate directly to the rights of persons within the States and as between the States and such persons therein. These prohibitions upon the political powers of the States are all of such nature that they can be, and even have been, when the occasion arose, enforced by the courts of the United States declaring void all State acts of encroachment on Federal powers. Thus, and thus sufficently, has the United States 'enforced' these provisions of the Constitution. But there are some that are not of this class. These are where the court secures the rights or liabilities pf persons within the States, as between such persons and the States.

Cong. Globe, 42d Cong., 1st Sess., App. 68. The clear implication of Rep. Shellabarger's statement is that the 1871 Act was designed to provide a remedy for the latter category of constitutional violations he discusses, and not the former.

The Court also notes that the Eighth Circuit has warned against expansion of the coverage of §1983 "into areas unrelated to the interests protected by the Fourteenth Amendment." First National Bank of Omaha v. Marquette National Bank of Minneapolis, 636 F. 2d 195, 199 (8th Cir. 1980), **cert. denied**, 450 U.S. 1042 (1981). Although the question in that case was whether a federal **statute** secured any "rights, privileges, or immunities" within the meaning of §1983, the Court believes the following statement from the opinion gives some indication of the Eighth Circuit's position on the existence of a right protectable by §1983 in the case at bar: "It is our view that section 1983 does not authorize a suit for an alleged violation of a purely economic regulatory statute affecting only commercial institutions as is the case here." **Ibid.** n. 3.

In summary, the Court holds that §1983 was not intended to, and does not, provide a remedy for a dormant Commerce Clause claim. Section 1983 is concerned with the relationship between individuals and the states in matters involving life, liberty or property, and was not intended to apply to the distribution of powers between the general and state governments under our federal system. Because the Court concludes that the above-captioned action does not contain a valid claim under §1983,[9] and because the existence of such a claim is the sole basis for plaintiff's asserted entitlement to attorney's fees under 42 U.S.C. §1988, it follows that plaintiff is not entitled to recover attorney's fees under that section.

IT IS THEREFORE ORDERED that plaintiff's motion for partial summary judgment on the issue of plaintiff's entitlement to attorney's fees be and it hereby is denied.

IT IS FURTHER ORDERED that the motions of defendants and the defendant-intervenor for partial summary judgement on the issue of plaintiff's entitlement to attorney's fees be and they hereby are granted.

IT IS FURTHER ORDERED that the Clerk of Court is authorized and directed to enter judgment in favor of the defendants and against the plaintiff for the court costs related to this sole remaining issue.

Signed this 14 day of February, 1983.

W. C. STUART, CHIEF JUDGE
SOUTHERN DISTRICT OF IOWA.

FOOTNOTES

[1] A number of the dormant Commerce Clause cases which have reached the United States Supreme Court did not originate in federal court, but rather in state court regulatory proceedings where a party objected to a state statute or regulation on Commerce Clause grounds. **See, e.g.,** Hood & Sons, Inc. v. DuMond, 336 U.S. 525 (1949); Cooley v. Board of Wardens, 12 How. 299 (1851).

[2] The $10,000 amount in controversy requirement was eliminated from §1331 on December 1, 1980, by Pub. L. 96-486, 94 Stat. 2369.

[3] Defendants assert, however, that another recent case, Czajkowski v. State of Illinois, 460 F. Supp. 1265, 1277-79 (N.D. Ill. 1977), **aff'd**, 588 F. 2d 839 (7th Cir. 1978), reaffirms the **Connor** holding. The Court notes that the basis of **Czajkoski's** holding that there was no §1343(3) jurisdiction was not that the plaintiff's claims were based on the Commerce Clause, but that they came within a special tax case exception to §1343(3) jurisdiction. Thus, no weight will be accorded **Czajkowski** in deciding the question before this Court.

[4] Section 1362 provides:

> The district courts shall have original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States.

It should be noted that this section is phrased in the broad "arises under the Constitution" language of §1331 rather than the "right, privilege or immunity secured by the Constitution" language of §1343(3).

[5] It is appropriate to re-emphasize here that in cases where deprivation of a constitutional right is relied upon, the scope of §1983 is co-extensive with that of §1343(3). **Lynch**, 405 U.S. at 544 n. 7.

[6] Section 1331 jurisdiction was unavailable in **Chapman** only because the amount on controversy did not exceed $10,000. 441 U.S. at 606.

[7] The case from which this doctrine stems is Cooley v. Board of Wardens, 12 How. 299 (1851).

[8] Prof. Choper explains the difference as follows:

> There is a distinctive qualitative difference separating constitutional issues of federalism from those of individual liberty . . . . [T]the difference may be described as one between issues of practicality and issues of principle.
>
> When government action abridges constitutionally ordained personal liberites, it seems likely that at least in view of short-run concerns for efficient public administration and businesslike accomplishment of laudable public objectives, the commonweal would usually be better served by compromising the interests seeking judicial protection . . . . In the main, it is only our historic ideals and special regard for the dignity of the individual that compel the collective will to subjugate its more immediate needs to the preservation of designated individual rights. In short, it is government according to principle.
>
> Constitutional issues of federalism, on the other hand, are a distinguishable species . . . . [These issues involve the question] whether, as a functional matter, the states are separately capable of effecting the desired result. The . . . question posed is thus one of comparative skill and utility—in a word, an issue of practicability.

J. Choper, **supra**, at 201-02.

[9] In light of this conclusion, it is unnecessary to address other issues raised by the parties' cross-motions and briefs.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 83-1337

CONSOLIDATED FREIGHTWAYS CORPORATION OF DELAWARE,

Appellant,

v.

RAYMOND KASSEL, et al.,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF IOWA

Submitted: October 11, 1983
Filed: March 27, 1984

Before BRIGHT, JOHN R. GIBSON, and FAGG, Circuit Judges.

JOHN R. GIBSON, Circuit Judge.

Consolidated Freightways Corporation of Delaware was successful in its efforts to have Iowa's statute restricting Consolidated's use of sixty-five foot twin trailers declared invalid as a violation of the Commerce Clause. It now seeks attorney's fees from the State of Iowa under 42 U.S.C. §1988 (Supp. V 1981), an issue which was bifurcated in the earlier hearing. The district court[1] held that Consolidated failed to demonstrate a fourteenth amendment violation as a basis for applying 42 U.S.C. §1983 (Supp. V 1981) and that its success on the Commerce Clause claim did not establish a deprivation of any right, privilege, or immunity secured by the Constitution within the meaning of 42 U.S.C. §1983. The claim for attorney's fees was denied. We affirm.

Consolidated brought its action against the State of Iowa to declare its statute, Iowa Code §321.457 (1979), restricting the length of trailers and prohibiting the use of sixty-five foot twins within its borders, to be invalid. The district court in **Consolidated Freightways Corp. v. Kassel**, 475 F. Supp. 544 (S.D. Iowa 1979), found for plaintiff on the merits of the Commerce Clause claim. We affirmed, 612 F.2d 1064 (8th Cir. 1979), and the United States Supreme Court in **Kassel v. Consolidated Freightways Corp.**, 450 U.S. 662 (1981), also affirmed. The district court conducted a fourteen-day trial on the issue of safety and on the burden of interstate commerce. The Supreme Court concluded:

> The controlling factors thus are the findings of the District Court, accepted by the Court of Appeals, with respect to the relative safety of the type of trucks at issue, and the substantiality of the burden on interstate commerce.

> Because Iowa has imposed this burden without any significant countervailing safety interest, its statute violates the Commerce Clause. The judgement of the Court of Appeals is affirmed.

Kassel, 450 U.S. 678-79 (footnotes omitted).

In its order denying an award of attorney's fees, the district court observed that plaintiff had prevailed on the Commerce Clause ground and that the §1983 ground had not been decided by the district court, the Eighth Circuit or the Supreme Court. The district court then considered the §1983 argument insofar as it was based upon the fourteenth amendment and found that even though the statute on truck-length limitation was later found to be invalid, the Iowa legislature had authority for due process purposes to pass such statute. There was thus no due process violation under the fourteenth amendment to form a basis for application of §1983. The district court then proceeded to consider the question of whether the Commerce Clause secured rights cognizable under §1983 and concluded that it did not. The basis for the district court's decision was that the Commerce Clause dealt with the distribution of powers between the federal and state governments under the federal system, and §1983, which was concerned with the relationship between individuals and the states in matters involving life, liberty or property, was not intended to apply.

Consolidated argues that §1983 applies to violations of the Commerce Clause because the right to engage in commerce is secured by the Constitution, and that the district court erred in concluding to the contrary. Consolidated also argues that Iowa's ban on the operation of sixty-five foot twins deprived it of property and

deprived its employees and others of their lives and safety. We deal with these arguments in turn.

I.

42 U.S.C. §1988 provides for the allowance of reasonable attorney's fees as part of the costs "[i]n any action or proceeding to enforce a provision of . . . [42 U.S.C. §] 1983." Under 42 U.S.C. §1983:

> Every person who, under color of any statute, . . . of any State . . . subjects, or causes to be subjected, any . . . person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

In its amended complaint, Consolidated alleged that Iowa's statutory ban on sixty-five foot twin trailer trucks violated the Commerce Clause, the fourteenth amendment and 42 U.S.C. §1983. Without considering whether §1983 was an appropriate basis for liability, the court found for Consolidated on the Commerce Clause ground. However, the fact that a party prevails on a ground other than §1983 does not preclude an award of attorney's fees under §1988. If §1983 would have been an appropriate basis for relief, then Consolidated is entitled to attorney's fees under §1988 even though relief was actually awarded on another ground. **See Maher v. Gagne**, 448 U.S. 122, 132 n.15 (1980).

II.

A.

Since Consolidated prevailed on its Commerce Clause claim, the first question is whether the Commerce Clause

secures rights which are cognizable under §1983. In its brief, Consolidated cites two cases which have held that a violation of the Commerce Clause constitutes a claim under §1983.

In **Confederated Salish and Kootenai Tribes v. Moe**, 392 F. Supp. 1297 (D. Mont. 1975), **aff'd**, 425 U.S. 463 (1976),[2] an Indian tribe and certain of its individual members challenged a Montana taxing statute, partly on Commerce Clause grounds. After finding jurisdiction over the tribe's claims under 28 U.S.C. §1362 (1976), the district court went on to find that it had jurisdiction over the individual claims under 28 U.S.C. §1343(3) (Supp. V 1981),[3] because the "alleged violation of Commerce Clause rights is sufficient to state a claim under §1983." **Kootenai**, 392 F. Supp. at 1304-05.

Kennecott Corp. v. Smith, 637 F.2d 181 (3d Cir. 1980), the other case cited by Consolidated, simply stated in a footnote, without further explanation, that the plaintiff's action was properly brought under §1983 because it sought "redress for deprivations of constitutional rights secured by the commerce clause and of federal statutory rights protected by the Williams Act." 637 F.2d at 186 n.5. We do not find these cases to be persuasive because neither **Kootenai**, **Kennecott**, nor the cases upon which they rely substantially discuss whether the Commerce Clause is a Constitutional provision which secures rights within the meaning of §1983.

The district court in **Kootenai**, as does Consolidated here, relied soley upon the dictum in **Lynch v. Household Finance Corp.**, 405 U.S. 538, 549 n.16 (1972), that the phrase "rights, privileges, or immunities secured . . . by

the Constitution or laws of the United States" embraces not only fourteenth amendment rights but "**all** of the Constitution and laws of the United States."[4] (emphasis in original). **Lynch**, however, involved a fourteenth amendment due process and equal protection challenge, not a Commerce Clause claim. As explained in Consolidated's brief, **Lynch** addressed the question of whether "property rights" as well as "personal rights" are within the ambit of §1983. 405 U.S. at 542. **Lynch** did not hold that the Commerce Clause is a source of rights within the meaning of §1983.

The authority relied upon in **Kennecott** is also not dispositive. The only case cited in **Kennecott** is **Maine v. Thiboutot**, 448 U.S. 1 (1980). Although the Supreme Court held in **Thiboutot** that the phrase "and laws" in §1983 is not limited to federal statutes providing for equal rights, the Supreme Court has also recognized that not all statutes secure rights within the meaning of §1983, even though individuals may benefit from their provisions. **See Middlesex County Sewerage Authority v. National Sea Clammers Ass'n**, 453 U.S. 1, 19 (1981); **Pennhurst State School and Hospital v. Halderman**, 451 U.S. 1, 28 (1981).[5] Neither the holding in **Lynch** nor **Thiboutot** provides an answer to the question of whether the Commerce Clause is a Constitutional provision which secures rights within the meaning of §1983.

As pointed out by the district court in its well-reasoned opinion, 556 F. Supp. 740, 743 (S. D. Iowa 1983), Commerce Clause actions traditionally have been brought directly under the Constitution with jurisdiction predicated on 28 U.S.C. §1331 (Supp. V 1981) rather than under §1983[6] and its jurisdictional counterpart, §1343(3),

even though under §1331 there was an amount in controversy requirement not necessary for actions brought under §1983.[7]

An early application of this rule is found in **Connor v. Rivers**, 25 F. Supp. 937 (N.D. Ga. 1938), **aff'd**, 305 U.S. 576 (1939). In **Connor**, the district court stated that the history of §1983 (then codified as 8 U.S.C. §43) persuaded them that its jurisdictional counterpart, §1343(3) (then codified as 28 U.S.C. §41(14)), "does not give jurisdiction in this suit." **Connor**, 25 F. Supp. at 938. The court explained as follows:

> While there is an allegation about the Georgia statute's interfering with interstate commerce, it is clear that there is no claim or evidence that said Georgia Statute deprives the petitioner 'of any right, privilege, or immunity, secured by the Constitution of the United States . . . .'

Connor, 25 F. Supp. at 938.

As even Consolidated concedes, not every case arising under the Constitution falls within §1983.[8] In **Chapman v. Houston Welfare Rights Organization**, 441 U.S. 600 (1979), the Supreme Court concluded that the Supremacy Clause of Article VI does not "secure" and is not itself, a "right, privilege, or immunity secured by the Constitution." The Court stated:

> Thus, while we recognize that there is force to claimants' argument that the remedial purpose of the civil rights legislation supports an expansive interpretation of the phrase 'secured by the Constitution,' . . . we must conclude that an allegation of incompatibility between federal and state statutes and regulations does not, in itself, give rise to a claim 'secured by the Constitution' within the meaning of §1343(3).

Chapman, 441 U.S. at 615.

Although the Commerce Clause differs from the Supremacy Clause in that the Commerce Clause is a specific grant of legislative power to Congress,[9] the two clauses are analogous in the sense that both clauses limit the power of a state to interfere with areas of national concern.[10] Just as the Supremacy Clause does not secure rights within the meaning of §1983, neither does the Commerce Clause.

B.

Iowa contends that the Commerce Clause does not establish individual rights against government, but instead allocates power between the state and federal governments. On the basis of the nature of the Commerce power as defined by the case law, including the thorough analysis of the district court in this case, and as explained by legal commentators, we must agree with the interpretation of the Commerce Clause as an allocating provision, not one that secures rights cognizable under §1983.

The Commerce Clause grants to Congress the power to regulate interstate commerce. **Gibbons v. Ogden**, 22 U.S. (9 Wheat.) 1 (1824). That grant of power has been held to imply a limitation upon the states. **Philadelphia v. New Jersey**, 437 U.S. 617, 623 (1978); **Hunt v. Washington Apple Advertising Commission**, 432 U.S. 333, 350 (1977); **Cooley v. Board of Wardens**, 53 U.S. (12 How.) 299 (1851).

It is clear from the language employed by the Supreme Court in Commerce Clause cases that the Commerce Clause deals with the relationship between national and

state interests, not the protection of individual rights.[11] These decisions are replete with references to the **national** of **federal interest** in preventing the burdensome state regulation of interstate commerce. **See, e.g., Bibb v. Navajo Freight Lines**, 359 U.S. 520, 524 (1959); **Hood & Sons, Inc. v. Du Mond**, 336 U.S. 525, 537-42 (1949); **Southern Pacific Co. v. Arizona**, 325 U.S. 761, 775-76 (1945).

In the Supreme Court's opinion in this very case the emphasis is on the role of the Commerce Clause in preventing state regulation from "trespass[ing] upon **national interests.**" **Kassel v. Consolidated Freightways**, 450 U.S. 662, 669 (1981) (emphasis added). In striking down the Iowa truck-length limitations, the Court stated that Iowa's "regulations impair significantly the **federal interest** in efficient and safe interstate transportation . . . ." **Id.** at 671 (emphasis added).[12] No where does the Court refer to the impairment, infringement, or protection of the interests or rights of the individual. Throughout the Commerce Clause cases the emphasis on the relationship between conflicting federal and state interests, not the relationship between the individual and the state. **See Raymond Motor Transportation, Inc. v. Rice**, 434 U.S. 429, 440 (1978).

To support its theory that the Commerce Clause secures rights cognizable under §1983, Consolidated has cited several Supreme Court cases which refer to a Constitional "right" to engage in interstate commerce. **Garrity v. New Jersey**, 385 U.S. 493, 500 (1967); **Western Union Telegraph Co. v. Kansas**, 216 U.S. 1, 21 (1910); **Crutcher v. Kentucky**, 141 U.S. 47, 57 (1891). Although these cases do refer to engaging in interstate commerce as a consti-

tutional right, such cases were not dealing with the question of whether the Commerce Clause secures individual rights within the meaning of §1983. In **Garrity** the reference to interstate commerce was mere dictum,[13] and in both **Western Union** and **Crutcher**, the focus of the Court's opinions was on the separation of powers between the national and state legislatures.[14] Despite these references to a right to engage in interstate commerce, we agree with the district court that the Commerce Clause was adopted, and the dormant Commerce Clause doctrine evolved, not to protect individual rights, but to further the national interest in an efficient economy. **See generally Hood & Sons, Inc.**, 336 U.S. at 537-39.

Although individuals are oftentimes benefited through the indirect protection resulting from the limitations placed on the states through the dormant Commerce Clause doctrine, such benefit is not the same thing as a "right" secured by the Constitution within the meaning of §1983. As explained by Professor Gavit in his discussion of the Commerce Clause:

> The Commerce Clause created no rights or privileges; it established no law other than the law of jurisdiction to regulate those engaged in interstate or foreign commerce.

B. Gavit, **Commerce Clause** 32-33 (1932). Professor Dowling, in his article about the relationship between state and national interests in dormant Commerce Clause cases, makes the same point: "It is true that the litigation is between private parties, but the issue touches the relative jurisdiction of nation and state." Dowling, **Interstate Commerce and State Power**, 27 Va. L. Rev. 1, 22-23 (1940).

C.

The legislative history of 42 U.S.C. §1983 does not support Consolidated's view that the Commerce Clause secures individual rights of the type protected by §1983. Section 1983 was originally §1 of the Civil Rights Act of 1871.[15] The Act of 1871, also known as the Ku Klux Klan Act, was directed at the organized terrorism in the south led by the Klan, and the unwillingness or inability of state officials to control the widespread violence. The portion of the Act now codified as §1983 added civil remedies to the criminal penalities imposed by the 1866 Civil Rights Act. **Chapman**, 441 U.S. at 610 n.25. The origin of §1983 alone is a strong indication that Congress did not have Commerce Clause litigation in mind when it enacted §1 of the Civil Rights Act of 1871.

Section 1983 was enacted for the purpose of "ensuring a right of action to enforce the protections of the Fourteenth Amendment and the federal laws enacted pursuant thereto." **Chapman**, 441 U.S. at 611; **Mitchum v. Foster**, 407 U.S. 225, 238 (1972). Although the Supreme Court has made clear that §1983 does protect rights established by statutes enacted pursuant to authority other than the fourteenth amendment, **Thiboutot**, 448 U.S. at 4, it has not held that §1983 encompasses Constitutional provisions which allocate power between the state and federal government.[16]

Although the scope of §1983 has been expanded by the **Thiboutot** decision, the Supreme Court's holding that §1983 provides a cause of action for interference with rights under the Social Security Act does not represent an expansion into areas unrelated to the interests protected by the fourteenth amendment. As this Court stated

in **First National Bank of Omaha v. Marquette National Bank of Minneapolis**, 636 F.2d 195, 198 (8th Cir. 1980), **Cert. denied**, 450 U.S. 1042 (1981), the type of rights protected by §1983 are "important personal rights akin to fundamental rights protected by the Fourteenth Amendment." Any individual benefits accruing from the Commerce Clause are completely different from the rights protected by the fourteenth amendment and do not fall within the scope of §1983.

In **Marquette** we held that the National Bank Act did not secure any rights, privileges, or immunities within the meaning of §1983.

> [S]ection 1983 does not authorize a suit for an alleged violation of a purely economic regulatory statute affecting only commercial institutions . . . .

Id. at 199 n.3. Although **Marquette** involved a federal statute rather than a Constitutional provision such as the Commerce Clause, we believe our position in **Marquette** is relevant to the instant case.

In **Monroe v. Pape**, 365 U.S. 167 (1961), Justice Douglas discerned three purposes underlying the original enactment of §1983: (1) to override discriminatory state laws; (2) to provide a remedy where state law was inadequate; and (3) to provide a federal remedy where the state remedy, although adequate in theory, was not available in practice. **Monroe**, 365 U.S. at 173-74. To hold that an alleged violation of the Commerce Clause constitutes an action cognizable under §1983 would fail to serve any of these purposes and would be an unwarranted extension of the Civil Rights Act. We do not believe

that such a cause of action was within the intent of the Congress that enacted the civil rights statutes, nor do we believe that such an interpretation of the scope of §1983 is mandated by either the language of §1983 or the nature of the Commerce Clause. We therefore hold that §1983 does not provide a remedy for a dormant Commerce Clause claim.

III.

Consolidated contends that even if its Commerce Clause claim does not fall within the scope of §1983, Iowa's ban on sixty-five foot trailers deprived it of property without due process in violation of the fourteenth amendment. Violations of the fourteenth amendment, including those which involve deprivations of property, are clearly within the ambit of §1983. **Lynch**, 405 U.S. at 543. Consolidated argues that the Iowa legislature lacked the authority to pass its statute banning long trucks; and that therefore, the enactment of such a statute deprived Consolidated of property without due process. We agree with the district court the Consolidated has not demonstrated a fourteenth amendment violation.

A state may, pursuant to its police power, enact regulations to promote highway safety and provide for the state's general welfare. **See**, **Nebbia v. New York**, 291 U.S. 502, 523 (1934); **E. B. Elliott Advertising Co. v. Metropolitan Dade County**, 425 F.2d 1141, 1151-52 (5th Cir.), **cert. denied**, 400 U.S. 805 (1970). To be consistent with due process such regulations need only meet a reasonableness test. **Goldblatt v. Hempstead**, 369 U.S. 590, 594-96 (1962); **United States v. Carolene**

Products Co., 304 U.S. 144, 152-54 (1938); **Nebbia**, 291 U.S. at 525; **Gold Cross Ambulance & Transfer v. Kansas City**, 705 F.2d 1005, 1015 (8th Cir. 1983). Iowa's statute, although invalid under the Commerce Clause, would survive the more restricted scrutiny applied for purposes of due process analysis.[17]

We conclude that Consolidated has failed in its attempt to establish a fourteenth amendment violation as a basis for applying §1983. Since we also conclude that §1983 does not provide a remedy for claims under the Commerce Clause, it follows that Consolidated is not entitled to attorney's fees under §1988. Therefore, the judgement of the district court is affirmed.

FOOTNOTES

[1]The Honorable W. C. Stuart, United States District Judge for the Southern District of Iowa.

[2]The Supreme Court affirmed the district court's jurisdictional holdings with regard to the tribal claims under §1362, but did not reach the district court's conclusion that jurisdiction over the individual claims existed under §1343(3). **Moe v. Confederated Salish and Kootenai Tribes**, 425 U.S. at 475 n.14.

[3]28 U.S.C. §1343(3) is the jurisdictional counterpart to 42 U.S.C. §1983. **Lynch v. Household Finance Corp.**, 405 U.S. 538, 543-44 (1972).

[4]**Lynch, supra**, was quoting **United States v. Price**, 383 U.S. 787, 797 (1966). Even in **Price** the quoted statement was dictum. The issue in **Price** was whether 18 U.S.C. §241 (1982), the criminal statute involving conspiracies to deprive a citizen of his constitutional rights, included rights protected by the fourteenth amendment. In holding that it did, the Supreme Court noted that both §241 and 18 U.S.C. §242 (1982) (a similar criminal statute lacking the conspiracy element) included rights or privileges secured by the Constitution or laws of the United States. The Court then stated: "Each includes, presumably, **all** of the Constitution and laws of the United States." (emphasis in original). 383 U.S. at 797.

[5]**See also First national Bank of Omaha v. Marquette National Bank of Minneapolis**, 636 F.2d 195, 198 (8th Cir. 1980), **cert. denied**, 450 U.S. 1042 (1981); **Chase v. McMasters**, 573 F.2d 1011, 1017 (8th Cir.), **cert. denied**, 439 U.S. 965 (1978).

[6]While there has been continuous activity in the area of Commerce Clause litigation, §1983 was largely ignored for almost seventy years after its enactment. In **Hague v. C.I.O.**, 307 U.S. 496 (1939), the Supreme Court gave the first modern interpretation of §1983, holding that the right to assemble and distribute literature was within the protection of §1983 as a privilege or immunity secured by the Constitution. **Hague**, 307 U.S. at 512. However, it was not until the Supreme Court's 1961 decision on **Monroe v. Pape**, 365 U.S. 167 (1961), that §1983 became a significant source of litigation. **See, e.g.**, Friedman, **Constitutional Torts** 3 (1983); **Developments in the Law-Section 1983 and Federalism**, 90 Harv. L. Rev. 1133, 1167-69 (1977).

[7]As Explained by Professor Moore, before 28 U.S.C. §1331 was amended:

> There remain some cases in which redress is sought against action taken under color of law in which the litigation must proceed under §1331 and the minimum amount in controversy must be shown. Actions against federal officers constitute one example . . . Another example is to be seen in actions challenging legislation as violative of the Commerce Clause.

1 J. Moore, **Federal Practice** ¶ 0.62(2.-2), at 666 n.48 (2d ed. 1983) (citations omitted).

The Federal Question Jurisdictional Amendments Act of 1980, effective as of December 1, 1980, eliminated the amount in controversy requirement for federal question jurisdiction. Pub. L. 96-486, 94 Stat. 2369.

[8]**See Poirier v. Hodges**, 445 F. Supp. 838, 842 (M.D. Fla. 1978) (contract clause claim is not a right redressable under §1983).

[9]"The Congress shall have Power . . . to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. Art. I §8.

[10]The "dormant" Commerce Clause doctrine which has evolved from the specific grant of power contained in the Commerce Clause, provides that states may not enact regulations which unduly burden interstate commerce even when Congress has failed to exercise its power to establish a uniform national regulation in the particular area.

[11]That federal economic regulation under the Commerce Clause is distinct from the protection of constitutional rights is made clear in the extensive law review article, **Section 1983 and Federalism**, **supra** note 6, 90 Harv. L. Rev. at 1166-67.

[12]This Court's earlier opinion in **Consolidated Freightways v. Kassel**, 612 F.2d at 1070, also emphasized the national interest in unburdened interstate commerce. Judge Heaney, speaking for the Court, stated that when balancing conflicting state and federal claims, "**national interests** must prevail." (emphasis added).

[13]The issue in **Garrity**, **supra**, concerned the privilege against self-incrimination, not interstate commerce.

[14]In **Western Union** the Court stated that the regulation of interstate commerce "is not within the province of state legislation, but within that of national legislation." 216 U.S. at 21. And in **Crutcher** the Court said that the regulation of interstate commerce "is a subject which belongs to the jurisdiction of the national and not the state legislature." 141 U.S. at 57.

[15]**See generally Section 1983 and Federalism, supra** note 6, 90 Harv. L. Rev. at 1153-56; **Monroe v. Pape**, 365 U.S. 167, 171-74 (1961); **Consolidated Freightways v. Kassel**, 556 F. Supp. at 748.

[16]That §1983 was not intended to provide a means of enforcing Constitutional provisions which allocate power between the state and federal governments is demonstrated by the following statement of Rep. Shellabarger, a leading proponent of the 1871 Act:

> Most of the provisions of the Constitution which restrain and directly relate to the States, such as those in tenth section of first article, that 'no State shall make a treaty,' 'grant letters of marque', 'coin money,' 'emit bills of credit,' & c., relate to the divisions of the political powers of the State and General Governments. They do not relate directly to the rights of persons within the States and as between the States and such persons therein. These prohibitions upon the political powers of the States are all of such nature that they can be, and even have been, when the occasion arose, enforced by the courts of the United States declaring void all State acts of encroachment on Federal powers. Thus, and thus sufficiently, has the United States 'enforced' these provisions of the Constitution. But there are some that are not of this class. These are where the court secures the rights or liabilities of persons within the States, as between such persons and the States.

Cong. Globe, 42d Cong., 1st Sess., App. 69 (1871). As the district court opinion stated, the implication of Rep. Shellabarger's statement is that §1983 was enacted to provide a remedy for the latter category of constitutional violations he mentions, and not the former. **Consolidated Freightways**, 556 F. Supp. at 748.

[12]Consolidated argues that because Iowa's statutory ban on long trucks was ultimately found to violate the Commerce Clause, it follows that the Iowa legislature lacked the authority to pass such a statute and, in so doing, violated due process. The district court viewed this as a bootstrapping argument, and we agree with its conclusion. The question of whether the Iowa statute violates the due process clause of the fourteenth amendment is distinct from the question of whether it violates the Commerce Clause. The fact that a statute is found to place an unconstitutional burden on interstate commerce does not transform the enactment of the statute into a due process violation.